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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 1108

CHAMBERSBURG BROADCASTING COMPANY, *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

## REPLY BRIEF TO MEMORANDUM IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The Memorandum for the Federal Communications Commission in Opposition addressed itself only to a defense of the Commission in failing to grant the application of WCHA. There appears to be no response to the issue of interposing Commission Rules to deny a grant in the public interest, convenience, and necessity under the Communications Act of 1934, as amended; nor on the issue of whether solely factual differences may suffice to warrant the Commission in refusing to follow its own precedents.

The Federal Communications Commission refused to permit an existing radio station in Chambersburg,

Pennsylvania, WCHA, to increase its power from 1 kw to 5 kw. The Review Board of the Federal Communications Commission although adopting, generally, the findings of the Examiner, reversed the Examiner. An appeal to the Commission itself failed. The Rule in question would have applicants serve 90% or more of the population falling within the applicant's normally protected contours.

The Commission in its Memorandum states that the issues in this appeal (Pg. 5) concerns "the optimum use of frequencies". No one has anywhere stated, and no one has tried to prove that the WCHA application would restrict the optimum use of the frequency for which it applied. *The fact is, the use proposed by WCHA is, really, the only use to which the frequency may be put in this area of the United States, and the proposed use does not limit the use of the frequency elsewhere in the country.* This is the optimum use of the frequency. The elements in this matter are so mixed that if WCHA does not increase its power and make the maximum possible use of this frequency, that use will remain unused, wasted, and lost to the public. No new radio applicant nor presently existing station can make this use of this frequency in the area requested excepting only WCHA and its application before this Court now.

In passing, the Memorandum seems to indicate that skywave is a phenomenon limited to broadcasting in the nighttime. FCC Docket 8333, 27 FCC 587, contains evidence proving that the skywave exists day and night. We could not find anywhere in the reference (Footnote 4 of the Memorandum) that 13% interference *to an applicant itself* was "ordinarily unsatisfactory while an

18% loss at night may nevertheless constitute an efficient use of the frequency".

It would be unfair to leave the Court with the impression that WCHA will contribute to some vague accumulation of interference. The reference (Pg. 4-5 of the Memorandum) "the accumulative effect of an excessive number of signals may become objectionable". The Standard of Good Engineering Practice cited are no longer in existence, secondly, the statement on "accumulative effect" has never been proved, either in this case or elsewhere, thirdly, the Commission has definite rules relating to interference, carefully described and scientifically worked out, and, fourthly, the present rules definitely recognize that additional signals do not always have the effect of increased interference on a given channel, Section 73.182(o)(6)(i).[1]

The Commission, in Chambersburg, where WCHA is located, granted a local station competing with WCHA nighttime service, where among the same people, with both stations in the same town the Commission stated that 18% interference was an efficient use of a frequency (the Commission specifically stated that it did not rely on the exception to the 10% Rule relating to nighttime service). How can the Commission

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[1] Examples of RSS interference calculations:

Existing interferences:

| | |
|---|---|
| Station No. 1 | 1.0 mv/m |
| Station No. 2 | 0.60 mv/m |
| Station No. 3 | 0.59 mv/m |
| Station No. 4 | 0.58 mv/m |

The RSS value from Nos. 1, 2, and 3 is 1.31 mv/m; therefore interference from No. 4 is excluded for it is less than 50 percent of 1.31 mv/m. Sec. 73.182(o)(6)(i).

justify 18% interference to one station and refuse 13% to the other in the same town when the Commission is considering only one element, interference to an applicant itself, and using only one norm, "efficiency"? May the Commission look so differently on such similar cases, particularly when a matter of competition is involved between them?

The Commission has many times granted applications wherein applicants receive over 10% interference as indicated in Petitioner's Petition, so that the Rule, 73.28(d)(3) does not disqualify an applicant which cannot serve 90% of the population within its protected contours. The Rule itself made exceptions. For all Class IV stations, the 10% Rule does not apply.

The 10% Rule is still on the books in one form or another, but a new rule for the first station in a community admits of much more than 10% interference, again showing the Commission does not really equate 10% interference with either actual inefficiency or "substandard stations".

The Memorandum in Opposition cites Federal Communications Commission v. Allentown Broadcasting Corp., 349 US 358, as granting broad discretion to the Commission in allocating frequencies. Allentown, supra, was not an allocations case but a contest between applicants for two different cities, Allentown and Easton, Pennsylvania. No other applicant opposed WCHA.

Also cited by the Memorandum is Thomas County Broadcasting Company, Inc., 35 FCC 525, granted by the Commission with 16.6% interference (WCHA 13.7%) increasing power from 1 to 5 kw (as is WCHA)

maximum use of a Mexican frequency (so also does WCHA request), but the Respondent states this case is different because it reduces interference. The reduction 16.67% to 16.60%.

Stevens County Broadcasting Co., 30 FCC 921, was also cited as being different from WCHA because Stevens applied for a frequency different from the one it was using. How is the allocation plan helped by simply swapping frequencies? This should encourage a WCHA grant for WCHA seeks to improve on what it has, not involve another frequency.

Congress ordered the Commission "to provide a fair, efficient, and equitable distribution of radio service", 47 USC 307(b). WCHA is already on the frequency with 1 kw, it proposes in its application 5 kw so that it may serve more people, more areas, and become a bigger and better service, and is therefor more efficient and not "substandard". No one else can render this service on this frequency.

In Daytime Skywave Transmissions, Docket 8333, 27 FCC 587, 18 RR 1845, the Commission states:

"Our objectives as we have stated many times are:

(1) to provide some service to all listeners.

(2) to provide as many choices of service to as many listeners as possible.

(3) to provide service of local origin to as many listeners as possible."

The WCHA application clearly comes within the second objective and there is positive evidence showing it does not preclude the first objective (or the third).

The Commission proposes (Daytime Skywave, supra) to give as many people as possible a choice of radio service—the WCHA application looks toward that end.

Respectfully submitted,

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